the court was grounded on the alleged residence of the wife, and the residence of the husband was not pleaded. A demurrer based on lack of jurisdiction of the cause of action was sustained below. *Held*, that the judgment be affirmed. *Aspinwall* v. *Aspinwall*, 160 Pac. 253 (Nev.).

In England a wife is generally denied the possibility of a separate domicil. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574. There is, however, a tendency away from the strict rule. See *Niboyet* v. *Niboyet*, 4 P. D. 1; *Swathatos* v. *Swathatos*, [1913] P. D. 46. In America a separate domicil for purposes of divorce is readily given to the wife. *Ditson* v. *Ditson*, 4 R. I. 87; *Cheever* v. *Wilson*, 9 Wall. (U. S.) 108. A few cases have permitted a separate domicil of a wife for purposes other than divorce. *Shute* v. *Sargent*, 67 N. H. 305; *Matter of Florance*, 61 N. Y. Sup. Ct. Rep. 328; *Gordon* v. *Yost*, 140 Fed. 79; *McKnight* v. *Dudley*, 148 Fed. 204. However, cases giving the wife a separate domicil seem to require that she leave her husband for good cause. See *Suter* v. *Suter*, 72 Miss. 345, 349, 16 So. 673, 674; *Kendrick* v. *Kendrick*, 188 Mass. 550, 555, 75 N. E. 151, 152. Applying this test to the principal case makes it appear that the husband must prove his own misconduct in order to make possible the separate domicil of the wife. This in turn defeats his action for divorce. It may perhaps be said that the wife's domicil when she sues for divorce need not depend upon having left her husband for good cause. See *Williamson* v. *Osenton*, 232 U. S. 619, 625. Such a rule would be advantageous, for in its absence a divorce decree may be overthrown on collateral attack on the ground of lack of jurisdiction, whenever a court takes a different view of the merits. But a domicil good for one purpose only is difficult to conceive and would seem to be nothing more than a privilege granted the wife on account of the necessity of the situation. Whether full faith and credit would be due a decision based on a jurisdiction of privilege only, is rather doubtful. But clearly, even under this view, the husband should not be allowed to make use of this privilege. The court seems to rely somewhat on a statute as requiring residence on the part of the moving party, but it is not clear that this is the meaning of the statute. See REVISED LAWS OF NEVADA, 1912, § 5838. Also *cf.* the principal case with *Smith* v. *Smith*, 15 D. C. 255.

CONFLICT OF LAWS — RIGHT TO RECOVER FOR MENTAL ANGUISH DUE TO NEGLIGENT NON-DELIVERY OF INTERSTATE TELEGRAM — APPLICATION OF INTERSTATE COMMERCE ACT. — Due to the negligence of the defendant telegraph company, a telegram sent by the plaintiff's husband from New Mexico was not delivered at its destination in Texas. The plaintiff, joining her husband, brought suit in Texas to recover for the mental anguish she suffered therefrom. *Held*, that she cannot recover. *Western Union Telegraph Co.* v. *Smith*, 188 S. W. 702 (Tex. Civ. App., 1916).

The plaintiff, as beneficiary of the telegram, notice of which was given the company by its context, is a proper party to maintain, independently, an action thereon for negligent non-delivery. *Sherrill* v. *Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Western Union Tel Co.* v. *Morrisson*, 33 S. W. 1025 (Tex. Civ. App., 1896). The court in the principal case accepted the proposition as proven, that the law of New Mexico does not allow recovery for mental anguish. But recovery for such injury is allowed in Texas. *Stuart* v. *Western Union Tel. Co.*, 66 Texas 580, 18 S. W. 351. There are at least three distinct views as to which state's law should govern. Many jurisdictions, conceiving the action to be *ex contractu*, hold with the principal case that the law of the place where the contract was made must govern. *Johnson* v. *Western Union Tel. Co.*, 144 N. C. 410, 57 S. E. 122; *Reed* v. *Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904. Others hold that the law of the place of performance governs. See MINOR, CONFLICT OF LAWS, §§ 153, 160. Of the states taking this view, at least one regards the performance as being entirely within the state

where the telegram is to be delivered. *Western Union Tel. Co.* v. *Lacer*, 122 Ky. 839, 93 S. W. 34. *Cf. Dike* v. *Erie Railway Co.*, 45 N. Y. 113. The others consider the performance as partly in one state and partly in the other, and apply the law of the state in which the breach occurred. *Western Union Tel. Co.* v. *Hill*, 163 Ala. 18, 50 So. 248; *Howard* v. *Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982. Several other jurisdictions apparently consider the action as *ex delicto* in nature, and hold that the law of the place where the breach occurred determines the right. *Gentle* v. *Western Union Tel. Co.*, 82 Ark. 96, 100 S. W. 742; *Fail* v. *Western Union Tel. Co.*, 80 S. C. 207, 60 S. E. 697; *Gray* v. *Western Union Tel. Co.*, 108 Tenn. 36, 64 S. W. 1036. But properly it should make no difference whether the cause be regarded as in tort or contract. The legal duty of the telegraph company, to perform, was created in New Mexico. But the violation of that duty took place in Texas. The law of Texas, therefore, is the only law that can determine the existence and limitation of any legal right arising out of the breach of duty. Therefore whether such breach creates a right to damages for mental anguish is dependent on Texas law. See *Barter* v. *Wheeler*, 49 N. H. 9; *Curtis* v. *Delaware, etc. Ry. Co.*, 74 N. Y. 116; *Baetjer* v. *La Compagnie*, 59 Fed. 789; MINOR, CONFLICT OF LAWS, §§ 153, 160. The case further suggests that neither the law of Texas nor New Mexico is applicable, because of the interstate nature of the telegram. It is clear that prior to the decision in *Western Union Tel. Co.* v. *Brown*, 234 U. S. 542, the imposition of liability for mental anguish, though not the common-law rule, was held a legitimate exercise of local administration, and not a burden on interstate commerce. *Ivy* v. *Western Union Tel. Co.*, 165 Fed. 371. See *Western Union Tel. Co.* v. *James*, 166 U. S. 650; *Western Union Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406. In a *dictum* in the *Brown* case, however, Mr. Justice Holmes declared that a South Carolina statute imposing liability for mental anguish arising from a negligent non-delivery in the District of Columbia was unconstitutional as an attempt to regulate interstate commerce. Upon the authority of this *dictum* alone, several state courts of last resort have held that recovery for mental anguish is precluded as a burden on interstate commerce. *Western Union Tel. Co.* v. *Johnson*, 115 Ark. 564, 171 S. W. 859; *Western Union Tel. Co.* v. *Bank of Spencer*, 156 Pac. 1175 (Okla.); *Western Union Tel. Co.* v. *Bilisoly*, 116 Va. 562, 82 S. E. 91. This interpretation seems unjustified. Of course, one state cannot dictate to another state what its law shall be regarding interstate commerce or anything else. This, it is submitted, is as far as the *dictum* goes. See *Bailey* v. *Western Union Tel. Co.*, 184 S. W. 519, 520 (Tex. Civ. App.). But it is further suggested that Congress has, by the Interstate Commerce Act as amended in 1910 to include within its scope interstate telegraph companies, entered and covered this field, making all state laws relating thereto in any manner inapplicable. It appears, however, that Congress merely declared that telegraph companies shall be considered as common carriers, and required them to charge reasonable rates, permitting certain classifications of messages as a basis. 1913 U. S. COMP. STAT., § 8563. The Interstate Commerce Commission has issued an order defining what companies shall be under the Act, and detailing the nature of improper charges. But this is all. The present action is not founded upon a violation of duty imposed by the Act, but upon common-law breach of contract; and until Congress has manifested a clear purpose to supersede the common law of a state, it remains in force. *Missouri, etc. Ry. Co.* v. *Harris*, 234 U. S. 412; *Reid* v. *Colorado*, 187 U. S. 137. The mere fact that Congress has enacted some legislation concerning interstate telegrams does not signify the necessary purpose to monopolize the whole field. *Atlantic, etc. Ry. Co.* v. *Georgia*, 234 U. S. 280; *Smith* v. *Alabama*, 124 U. S. 465; *Bailey* v. *Western Union Tel. Co.*, *supra*. *Cf. Louisville, etc. R. Co.* v. *Ohio, etc. Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 66.